

**Before the Copyright Office
Library of Congress**

In the Matter of Rulemaking)	
)	
Exemption to Prohibition on)	Docket No. RM 2008-8
Circumvention of Copyright Protection Systems)	
For Access Control Technologies)	
)	

Comments of the American Foundation for the Blind

Class: Literary Works

Summary: The American Foundation for the Blind proposes continuation of the exemption for the class of works defined as "literary." We propose continuation of this exemption because currently deployed anti-copy technology still does not support the fair use intended by Congress for this class of works.

Introduction

These comments are submitted in response to the Copyright Office's Notice of Inquiry, with respect to proceedings mandated by the Digital Millennium Copyright Act (DMCA), seeking further comment to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make non-infringing uses due to the prohibition on circumvention.

The American Foundation for the Blind (AFB) is a leading national resource for people who are blind or visually impaired, the organizations that serve them, and the general public. The mission of AFB is to enable people who are blind or visually impaired to achieve equality of access and opportunity that will ensure freedom of choice in their lives.

The proceedings mandated by the DMCA are of critical importance to the lives of people who are blind or visually impaired. Information in digital formats provides the opportunity for people who are blind or visually impaired to have access to and use of information at the same time and in the same manner as all users of that information. This type of access represents a constitutionally-based right, recognized by Congress and continuously upheld.

Technological measures to control access to copyrighted works have been developed and deployed in ways that prevent access to and fair use of this material by people who are blind or visually impaired. The Librarian recognized this reality in the similar rule makings that took place in 2002 (the “2002 Rule Making”) and 2005 (the “2005 Rule Making”). In the 2002 and 2005 Rule Making, the Librarian provided the exemptions needed to maintain fair use access for people who are blind or visually impaired. AFB noted that copy protection technology often significantly abridged the fair use access rights of people who are blind or visually impaired in 2002 and again in 2005. AFB demonstrated that such abridgement posed threats to ability of people who are blind or visually impaired to pursue work activities, education and such leisure activities as reading and entertainment. Now, six years after the 2002 Rule Making, copy protection continues to pose a significant barrier to digital content access for people who are blind or visually impaired.

The same hindrances and threats still exist today because copy protection measures continue to be implemented in ways that bar access by people who are blind or visually impaired. In the absence of accessibility progress, the Librarian must continue

the current exemption to ensure that people who are blind or visually impaired are not excluded from the digital revolution in education, information and entertainment.

As a publisher of conventional and electronic media and a holder of copyrights, AFB understands and remains firmly committed to protecting copyrighted works. We are equally committed to insuring non-infringing, fair use of materials so that technological measures to control access do not deny access by people who are blind or visually impaired.

In these comments we address the class of all literary digital publications, such as e-books. We assert that Congress clearly intended that fair use provisions not be sacrificed in efforts to secure digital content. Nonetheless, publishers and the technology industry have simply designed anti-copy technologies with apparently precious little effort to preserve fair use. Instead of working toward accessibility, many providers seem inclined to seek market dominance by closely linking published titles to particular technologies from particular vendors. This is not, we believe, an approach likely to preserve fair use. It certainly cannot preserve the rights of people who are blind or visually impaired to use their synthetic speech and screen magnification software, as well as Braille devices to access secured content.

As shown herein, the digital publishing industry's current approach fails to provide such access. Even when mainstream technology companies have claimed that access is provided, in practice, access is often denied. This situation has not changed appreciably since the 2002 Rule Making. Consequently, it is inappropriate for publishers and technology companies to seek shelter against circumvention technologies when the technology used undermines the clear legislative goal of the DMCA – and the entire

copyright regime – to facilitate fair use access by people who are blind or visually impaired. We ask the Librarian, therefore, to maintain the current exemptions for all literary digital content until security measures are developed that will preserve fair use rights and recognize the need for people who are blind or visually impaired to read e-books, electronic text books and similar digital offerings.

To the industry, we suggest standard use of well known technologies that can both protect works from piracy and allow for fair use, such as “Public Key Incryption (PKI)” technologies. Unfortunately, the digital publishing industry’s record in maintaining fair use access for people who are blind or visually impaired has not demonstrated a commitment to access. Therefore, until fair use access for people who are blind or visually impaired becomes the industry standard, the Librarian must maintain current exemptions.

Background

We provide the following information in support of our introductory comments. This information is the basis for our specific responses to this Notice.

Congress has historically recognized that the broad class of copyrighted works should, with respect to fair use, be accessible to and usable by people who are blind or visually impaired. The legislative history of the Copyright Act of 1976 states that:

Another special instance illustrating the application of the fair use doctrine pertains to the making of copies or phonorecords of works in the special forms needed for the use of blind persons. These special forms, such as copies in Braille and phonorecords of oral reading (talking books), are not usually made by the publishers for commercial distribution. While making multiple copies or phonorecords of work for general circulation requires the permission of the copyright owner, a problem addressed in section 710 of the bill, the making of a single copy or phonorecord by an individual as a free service for a blind person would properly be considered a fair use under section 107.
H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976).

Further, in the Supreme Court case of Sony Corporation of America. V. Universal City Studios, 464 U.S. 714 (1984) the Court stated that:

Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying. Id. at 456 n.40.

The Copyright Act imposes other specific limitations on the exclusive rights of copyright owners to ensure access for individuals who are blind or visually impaired. Section 110(8) excludes performances specifically designed for and directed to people who are blind or visually impaired using particular facilities; Section 121 (the Chaffee amendment) allows authorized entities to reproduce copyrighted materials and convert these materials to accessible formats for the use by people who are blind or visually impaired as well as people with other print disabilities.

As more information flows faster in rapidly multiplying digital formats, access to the information contained in digitized literary works is ever more critical to citizenship, education and overall participation in society. The Librarian must continue to ensure that the DMCA's "Circumvention of Copyright Protection Systems" provisions do not undermine the nation's historic commitment to fair use rights that enable such participation by people who are blind or visually impaired. Unless the Librarian renews the current exemption, severe sanctions await readers who are blind or visually impaired – or anyone else – who devises means to circumvent copy protection measures to allow access by people who are blind or visually impaired. The Librarian can simply not allow this to occur.

Access Issues for People Who Are Blind or Visually Impaired

Copyright protection measures continue to significantly impair access by people who are blind or visually impaired to works presented in new digital content formats. This occurs despite the existence of the current exemption. Eliminating the current exemption will make matters even worse, as it will bar efforts to circumvent copy protection, even if such efforts take place purely in the interest of fair use access by people who are blind or visually impaired.

In some instances, without such circumvention, people who are blind or visually impaired are completely prohibited from access, as the content may only be available in digital formats. As digital publishing matures, this situation can only grow worse. This is why the Librarian must issue an unambiguous reaffirmation of long established rights of fair use to repurpose content into accessible formats. As it is possible to maintain fair use access in the broad class of copyrighted works in such a manner that the exemption would not allow wholesale copyright infringement, there is no public interest justification to take any action except to continue the current exemption.

For people who are blind or visually impaired, the foundations of access in the digital age are the rights to access and appropriately manipulate any use-level controls; the fair use deconstruction of protected material in order to repurpose content into accessible formats, and; clear demarcation of media in a manner which allows a consumer to know that his or her use may be restricted.

After conducting evaluations in 2002 and 2005, we found that these needs went unmet in much of the marketplace. We conducted an evaluation again for a third time in 2008 and found that these needs continued to go unmet. Our three reviews of e-books

available for online purchase provided compelling evidence of the adverse effects that copy protection measures have, even today, on access to the general categories of authorship specified in Section 102.

As noted such inaccessibility occurs despite the current exemption. Such built-in inaccessibility also ignores the historic fact that alternative methods of reading lawfully-acquired works are, in fact, the precise kind of non-infringing uses long permitted to allow access by people who are blind or visually impaired to the science and useful arts specified in the U.S. Constitution. To allow the legal lock-up of content would deprive people who are blind or visually impaired of a major constitutional goal of copyright: “to foster the growth of learning and culture for the public welfare.” H. Rep. No. 2222, 60th Cong., 2d Sess. (1909).

Digital E-book Evaluation Preliminary Activities

To once again illustrate our assertions, we purchased several e-books online using a desktop computer with up-to-date software. We used a computer with Windows XP, Internet Explorer with updates, Adobe Acrobat version 8.1.2, and Freedom Scientific's Job Access with Speech (JAWS) version 9.0. Version 9.0 was the most recently-released upgrade for JAWS screen reading software when this evaluation was conducted.

Before beginning to download content, we downloaded and installed the Microsoft Reader product. In addition, after unsuccessfully attempting to access the first Microsoft Lit format book, the Microsoft text-to-speech component was downloaded and installed, but it did not improve the accessibility experience.

On October 9th, 2008, we downloaded five e-books created in either Adobe ".PDF" or Microsoft Reader ".Lit" formats. Two PDF books and three Microsoft Lit

format books were tested. Of the five books, only one was accessible – that is, only 20 percent of the works were accessible. During our tests, help was often required from sighted individuals. A summary of the experience follows. Screen shots of our experience with each of the four inaccessible e-books are shown in the appendix.

Examples of Digital E-books User Experiences

Title: *The Sign of the Fish*

Author: Joann Klusmeyer

This historical fiction novel written by one of the most prolific writers of e-books available on the Internet, opened in Acrobat, but content was not accessible. The screen reader voiced an extended string of question marks. Choosing the "accessibility quick check" on the "document" menu provided feedback, voiced by the screen reader. We were told that the "document's security settings prevented access by screen readers." This check did not indicate that this document is structured, so even if a screen reader could access the content, the user might be required to modify settings related to reading order preferences. The document cannot be saved as a text file.

Title: *Brian's Hunt*

Author: Gary Paulsen

This popular children's book was not accessible in the Microsoft Lit format. The work proved even less accessible than either of the Adobe PDF books as no messages were spoken with a screen reader. In fact, the Microsoft Reader software did not function fully with the screen reader, i.e. no menus were spoken or accessible using the keyboard. The Microsoft text-to-speech component did not improve the accessibility. As shown in

the screen shot, only when a sighted assistant used a mouse to click on the book did a message indicate that the content was not accessible with text-to-speech.

Title: *The Bridges of Madison County*

Author: Robert James Waller

This New York Times Best Seller was not accessible in the Microsoft Lit format. Our experience with this novel was virtually the same as the other Microsoft Reader digital books. The screen reader provided no feedback, and "tweaking" yielded no help to us when we tried to access the content independently. Sighted help was required to display the message in the screen shot.

Title: *The Einstein Theory of Relativity*

Author: H.A. Lorentz

This physics book is a public domain book in the Microsoft Reader Lit format. The book is inaccessible – this is true whether or not Microsoft's text-to-speech product is installed. Sighted help was required to display the message shown in the screen shot.

Title: *The Complete Works of Edgar Alan Poe Volume 1*

Authors: Edgar Alan Poe

This book, created using Adobe PDF, was the only one of the five that was accessible. The book opened easily in Acrobat version 8.1.2. We were permitted to choose options for processing and presenting the book in an accessible fashion. Although using the "accessibility quick check" indicated that the document was not tagged to provide structure, we were encouraged to try different reading order preferences, as necessary, in order to improve the reading experience. This 267-page book seemed to be

accessible after a quick skim through some pages using Adobe's "infer reading order" option.

Related Issues

A number of critical issues became apparent as we conducted real-world testing in an effort to gain access to digital e-books. Concerns include:

- There was nothing that indicated, in advance, whether content will be accessible when shopping for or purchasing e-books.
- Sighted assistance is required to access messages provided by the Microsoft Reader software indicating that content cannot be accessed by a screen reader.
- Users who purchase content but then find that they cannot read it will need to negotiate the company's return process. We found, for example, that users may return content purchased from the Amazon.com site within 30 days. We did not test this process to determine whether Amazon.com's approach is accessible.

Other companies' return policies may vary, so users should assess return policies prior to taking the risk of purchasing potentially inaccessible digital content.

Conclusion

In sum, any measure that excludes an identifiable part of the population from such clearly stated constitutional goals is not in the public interest. It was noted that copy protection technology often significantly abridged the fair use access rights of people who are blind or visually impaired in 2002 and again in 2005. The Librarian must extend the current exemption for the foreseeable future so that individuals who are blind or visually impaired are not excluded in this manner again from the exponential growth of learning and culture in today's increasingly digitized universe of literary works.

Respectfully submitted,

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Appendix to Report: Computer Screen Shots of Actual Messages Demonstrating Lack of Accessibility

Title: *The Complete Works of Edgar Alan Poe Volume 1*

Author: Edgar Alan Poe

No copyright information available

Digital Adobe Reader

Accessible with a screen reader with a few tweaks

Title: *The Sign of the Fish*

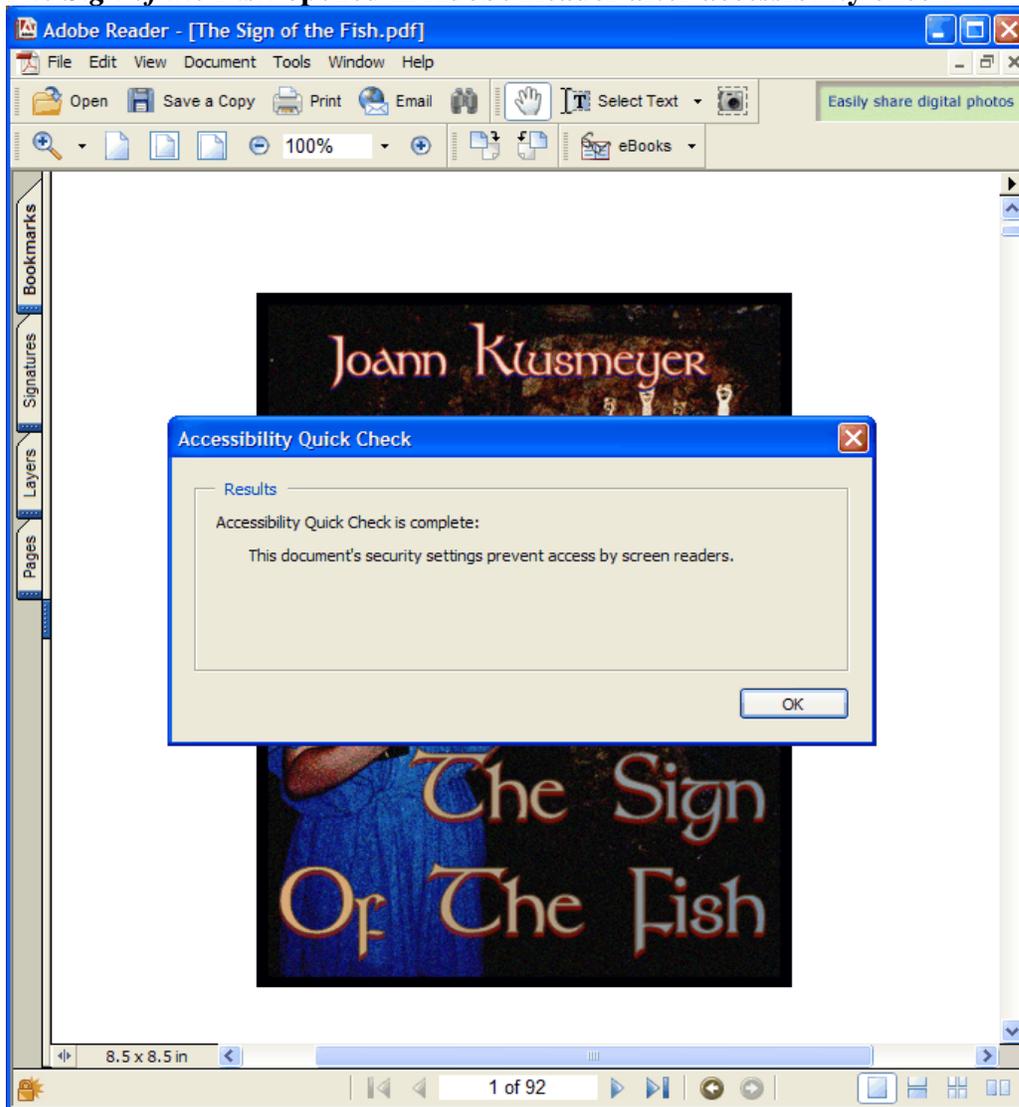
Author: Joann Klusmeyer

Copyright 2001

Digital Adobe Reader

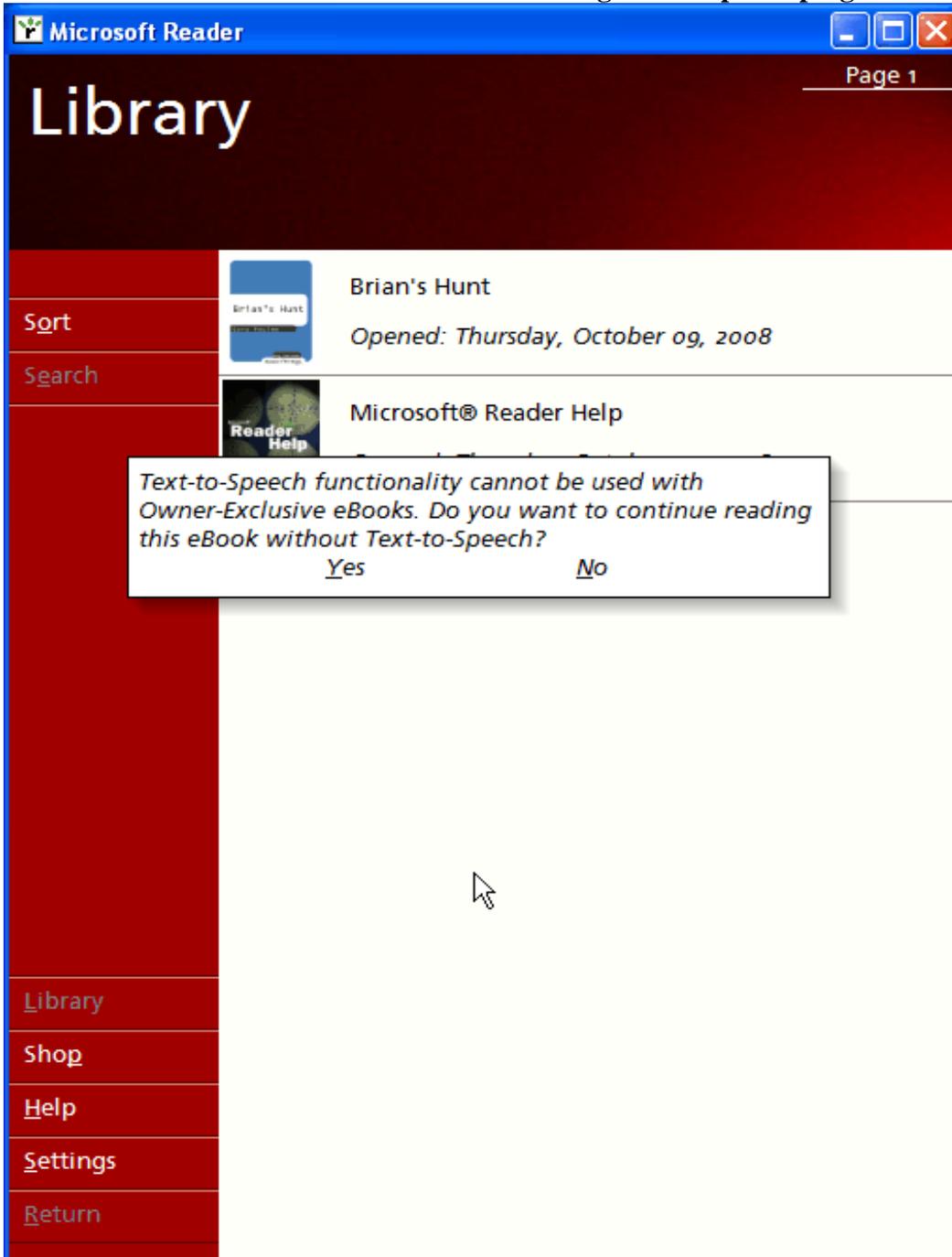
Inaccessible with a screen reader

The Sign of the Fish opened in Adobe Reader after accessibility check



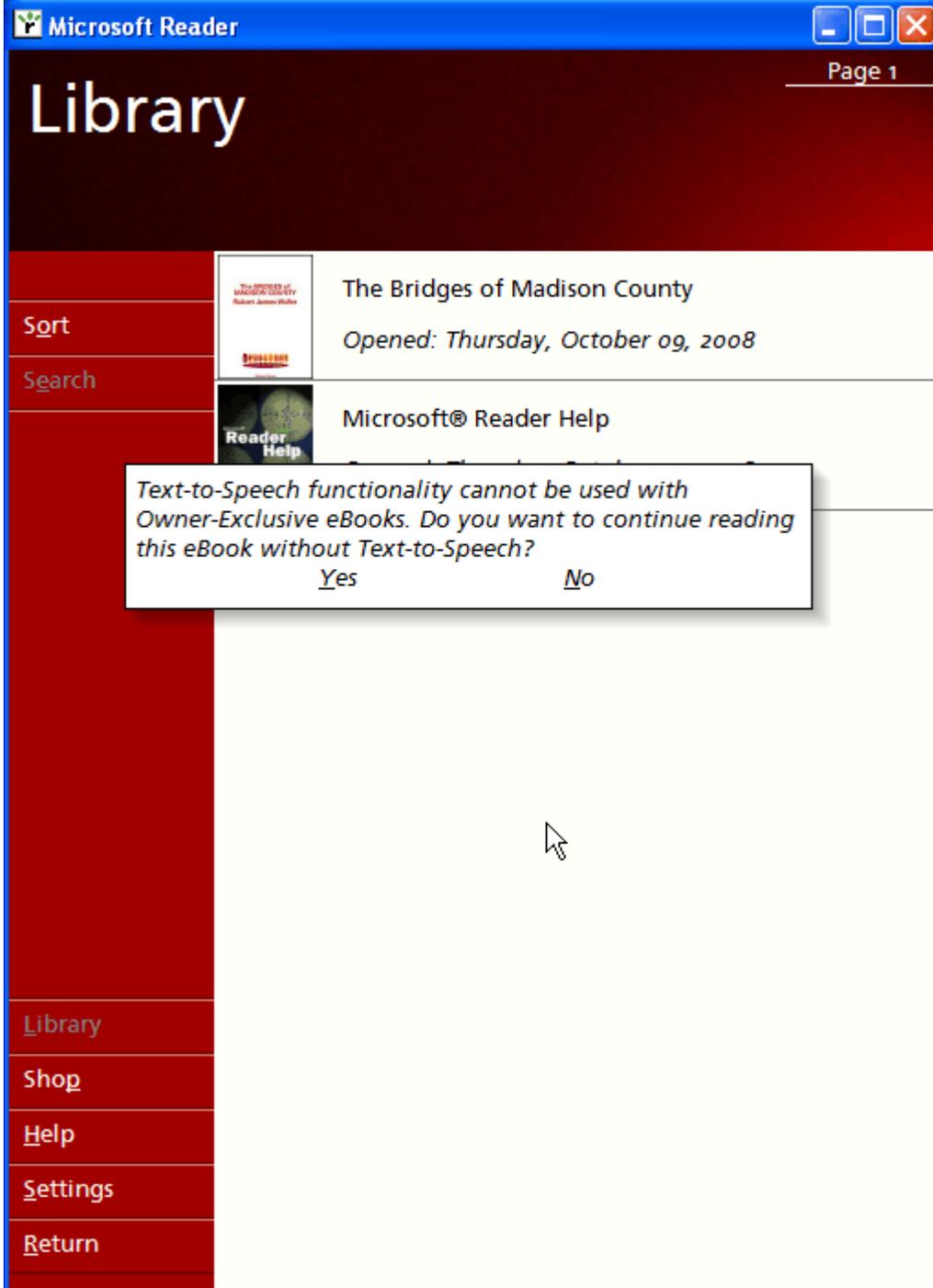
Title: *Brian's Hunt*
Author: Gary Paulsen
Copyright 2003
Digital Microsoft Reader
Inaccessible with a screen reader

***Brian's Hunt* in Microsoft Reader after installing text-to-speech plug in**



Title: *The Bridges of Madison County*
Author: Robert James Waller
Copyright 1992
Digital Microsoft Reader
Inaccessible with a screen reader

***The Bridges of Madison County* in Microsoft Reader after installing text-to-speech plug in**



Title: *The Einstein Theory of Relativity*
Author: H.A. Lorentz
In the public domain
Digital Microsoft Reader
Inaccessible with a screen reader

***The Einstein Theory of Relativity* in Microsoft Reader after installing text-to-speech plug in**

